

1 counsel, but informed plaintiff's counsel that as to other documents: "[t]here were no other
2 materials worthy of anything more than a trip to the trash can and everything else was discarded
3 weeks ago." *Id.* Thus, Otis seeks an order finding Carr in contempt of court and imposing a fine
4 and a term of imprisonment. *Id.*

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6 At a hearing before Magistrate Judge William G. Cobb on June 28, 2013, the parties were
7 advised that although the case was before the court pursuant to diversity jurisdiction, a U.S.
8 Magistrate Judge's contempt authority is derived from 28 U.S.C. § 636(e) (#59). The court advised
9 Carr that the allegations appear to be in the nature of criminal contempt and that Carr should retain
10 counsel. *Id.* Subsequently, Carr retained John C. Boyden, former law partner to Magistrate Judge
11 Cobb (#60). Magistrate Judge Cobb then recused himself and the matter is now before Magistrate
12 Judge Cooke (#61).

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14 In response to Magistrate Judge Cooke's August 22, 2013 Order to Show Cause why Carr
15 should not be sanctioned for disobedience of the stipulated confidentiality agreement and order, Carr
16 filed a notice of supplemental authority/request for dismissal (#70). Carr contends that as the matter
17 is proceeding as a criminal contempt hearing, the court must refer it to the United States Attorney for
18 prosecution, and counsel for Otis may not prosecute the matter. *Young v. U.S. ex rel. Vuitton el Fils*
19 *S.A.*, 481 U.S. 787, 790 (1987); Fed. R. Crim. P. 42(a)(2). Otis filed a response and stated that it
20 agrees that the court must refer the matter to the United States Attorney for prosecution (#71). Carr
21 then filed a request that the contempt hearing date of November 26, 2013 be vacated and
22 rescheduled for a later date with the participation of the United States Attorney (#72).
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1 The contempt authority for a United States Magistrate Judge is set forth in 28 U.S.C. §
2 636(e) and includes:

3 (3) Additional criminal contempt authority in civil consent and misdemeanor
4 cases.--In any case in which a United States magistrate judge presides with the
5 consent of the parties under subsection (c) of this section, and in any misdemeanor
6 case proceeding before a magistrate judge under [section 3401 of title 18](#), the
7 magistrate judge shall have the power to punish, by fine or imprisonment, or both,
8 criminal contempt constituting disobedience or resistance to the magistrate judge's
9 lawful writ, process, order, rule, decree, or command. Disposition of such contempt
shall be conducted upon notice and hearing under the Federal Rules of Criminal
Procedure.

10 Rule 42 of the Federal Rules of Criminal Procedure governs criminal contempt. Rule 42(a)(2)
11 prescribes that

12 The court must request that the contempt be prosecuted by an attorney for the
13 government, unless the interest of justice requires the appointment of another
14 attorney. If the government declines the request, the court must appoint another
15 attorney to prosecute the contempt.

16 The United States Supreme Court has clarified that “criminal contempt proceedings arising
17 out of civil litigation are between the public and the defendant, and are not a part of the original
18 cause.” *Young*, 481 U.S. at 804. As the “prosecutor is appointed solely to pursue the public interest
19 in vindication of the court’s authority,” *id.*, “counsel for a party that is the beneficiary of a court
20 order may not be appointed to undertake contempt prosecutions for alleged violations of that order.”
21 *Id.* at 790.

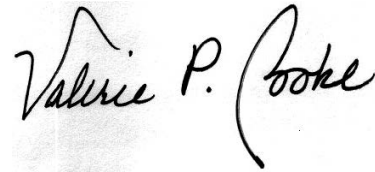
22 Accordingly, the matter of alleged criminal contempt is referred to the United States
23 Attorney. The show-cause hearing set for November 26, 2013 is hereby **VACATED**.
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25 Finally, at the August 22, 2013 hearing, Carr, by and through his attorney, indicated that he
26 consents to the jurisdiction of the U.S. Magistrate Judge (#65). **Within ten (10) days** of the date of
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1 this order, Carr **SHALL FILE** his signed AO 85 Notice of Availability, Consent, and Order of
2 Reference – Exercise of Jurisdiction by a U.S. Magistrate Judge (*see* #9 for link to form).

3 **IT IS SO ORDERED.**

4 **DATED: November 14, 2013.**

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6 **UNITED STATES MAGISTRATE JUDGE**
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